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IN THE

Supreme Court of the United States

October Term, 1958

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., *Appellants,*

v.

FRISCO TRANSPORTATION COMPANY, *Appellees.*

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

APELLANTS' REPLY BRIEF

GREGORY M. REBMAN
B. W. LATOURETTE
1230 Boatmen's Bank Bldg.
314 North Broadway
St. Louis 2, Mo.
WENTWORTH E. GRIFFIN
1012 Baltimore Street
Kansas City, Mo.
PETER T. BEARDSLEY
WILLIAM J. O'BRIEN, JR.
1424 Sixteenth Street, N.W.
Washington 6, D. C.

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Preliminary

These appellants filed their jurisdictional statement herein on December 3, 1957, before this Court's decision in *American Trucking Associations, Inc., et al.* v. *U. S. et al.*, — U.S. —, 78 S. Ct. 165. This reply brief is filed primarily because we believe that decision eliminates any need for determining one of the questions posed here, i. e., whether or not the unrestricted certificate received by appellee, a railroad subsidiary, was inadvertently issued by the Commission. Although that decision dealt with an application filed under §207 of the Interstate Commerce Act, 49 U.S.C. §307, we submit that the Court's opinion leaves no room for doubt that in a §5 case such as this the Commission lacks statutory power to authorize a railroad or its affiliate to perform unrestricted motor

operations. If we are correct, it follows that the unrestricted certificates here involved are a nullity, whether issued through inadvertence or otherwise, and must be restricted to conform to the requirements of the statute.

The Commission is Without Power to Issue Unrestricted Certificates Under §5(2)(b)

In our jurisdictional statement, filed December 3, 1957, we stated that the provisions of §5(2)(b) of the Interstate Commerce Act, 49 U.S.C. §5(2)(b), "flatly forbid the Commission to allow railroads or their affiliates to perform unrestricted motor vehicle operations." (page 9)

Appellee, in its motion to affirm, notes this contention, and points out (page 17) that "the Interstate Commerce Commission does not share the opinion of the appellants that Section 5(2)(b) of the Interstate Commerce Act must be so construed." Appellee also notes (p. 16) that what it terms a similar contention in connection with a §207 application "was recently rejected by this Court in *American Trucking Associations, Inc.* v. *United States of America*, Nos. 6 and 8, October Term, 1957, decided December 9, 1957." There is no further discussion of the cited case in appellee's brief. We think this Court's opinion therein clearly stands for the proposition that while the Commission may occasionally depart from the auxiliary and supplementary limitations of §5(2)(b) in a §207 proceeding, the corollary is that in a §5 case such as this the statutory language specifically applicable clearly deprives the Commission of the power to authorize unrestricted railroad truck service. The very language of the Court's opinion in the case referred to bears this out. The reference at — U. S. —, 78 S.Ct. 171, to the language of the proviso of §5(2)(b) as a "rigid requirement"— the statement, at the same page, that the Commission has not permitted "the §207 proceedings in this case to be used as a device to evade §5(2)(b) re-

strictions"—indeed the whole tenor of the opinion—strongly support our argument. In addition, it is further reinforced by Mr. Justice Frankfurter's dissent in *Schaffer Transportation Co. et al* v. *U. S. et al.*, — U. S. —, 78 S. Ct. 173, wherein he refers to the decision in the *American Trucking Associations* case as "a striking illustration of the difference between the limitation to which the Commission is subjected in a proceeding under §5(2)(b) of the Interstate Commerce Act * * * and the requirements of section 207 of that Act, * * * although both relate to motor carrier service by railroads." 78 S. Ct. at 178-179.

Since the language of the proviso of §5(2)(b) is a "rigid requirement" in acquisition cases, it will not do, as appellee attempts, to shrug it off with the assertion that the Commission does not share these appellants' opinion respecting its construction. This Court has spoken on the subject and its words leave no room for equivocation. If—as we believe the Court has now made clear—the Commission lacks the basic power to issue unrestricted motor-carrier operating authority to a railroad or its affiliate pursuant to an application filed under §5 of the Interstate Commerce Act, the question of whether Frisco received such certificates as a result of the Commission's inadvertence is purely academic. On the basis of its decision in the *American Trucking Associations* case we respectfully urge that the Court would be completely justified in summarily reversing the District Court's decision with instructions to remand the matter to the Commission for appropriate action in conformity with the mandate of the proviso of §5(2)(b).

The *Watson* Case Does Not Support the Decision of the Lower Court

Because appellee lays such great stress upon the *Watson* case (*Watson Bros. Transp. Co.* v. *U. S.*, 132 F. Supp.

905, affirmed 350 U.S. 302)[1] as authority for affirmance of the decision of the court below, a brief resume of its history seems in order. Watson's purpose in filing the application there involved was to "fill out" its authority by acquiring the right to haul explosives over all routes as to which it was certificated to transport general commodities; on sixty-nine of its eighty-four routes it already possessed authority to transport both categories of traffic. During the course of the hearing on the application, it developed that four government installations, not included in Watson's request for authority, and none more than a few miles off Watson's routes, had no motor carrier service whatever. 132 F. Supp. 906. When this became known, Watson's counsel moved to amend its application to include authority to serve the four installations, and counsel for protestants raised no objection provided that "[Watson's] counsel is agreeable to restricting the authority sought to service for the United States Government . . ." The examiner thereupon allowed the amendment. *Id.*, 906-907.

It thus becomes clear that whether Watson should have received a certificate authorizing only the transportation of explosives to the four installations (as contended by the Commission) or whether it was properly given authority to transport both explosives and general commodities, hardly constituted an important federal question worthy of full review by this Court. In the final analysis, Watson sought to render a complete service and the certificate issued authorized such service to the four government installations. Bearing in mind that protestants had no objection to broadening the application, so long as service to the United States Government was all that was sought, it seems obvious that had the all-inclusive certificate issued been "corrected" and revised to authorize only the transportation of explosives, Watson

[1] *Watson* is cited 10 times in appellee's motion to affirm.

would simply have filed another application requesting general-commodity authority to the four points involved, which in all probability would have met little or no resistance. These facts, plus those already set forth in our jurisdictional statement (pp. 6-8) make it clear that the alleged similarities between *Watson* and this case are far more apparent than real. In addition, appellee's contention[2] that our "attempt to distinguish the *Watson* case upon the ground that only lack of notice was the basis of the District Court's opinion and this Court's affirmance . . ." is a complete misstatement of our position. It completely overlooks, for example, our specific reference to the difference in status between Watson, an independent motor carrier, and Frisco, a rail subsidiary with respect to whom the language of the proviso of §5(2)(b) is specifically applicable.

The Commission Could Not Reverse its Prior Decision by The Mere Issuance of Compliance Orders

In our jurisdictional statement we urged (pp. 8-9) that the Commission could not, intentionally or otherwise, reverse its prior decisions, outside the record and without notice to the motor carrier protestants, respecting the authority to be issued to the rail subsidiary. Appellee's answer to this is its claim that the so-called compliance orders, issued prior to the certificates, constituted "notice of the Commission's intention to issue unrestricted certificates". (Appellee's Motion, pp. 15-16) This, of course, leaves unanswered the argument that the Commission, before it could validly reverse its prior conclusions reached in the underlying finance reports, would have had to give the motor-carrier protestants an opportunity to be heard, on the record, respecting the proposed change in the service to be authorized in the certificate to be ultimately issued to Frisco. Instead, ac-

[2] Motion to affirm, page 14.

cording to appellee's argument, the Commission did change its mind (we are not told when, where or why) and indicated that change by the issuance of the so-called compliance orders, evidenced by that reproduced as Appendix 1 to the motion to affirm. The inherent weakness in that argument, even when accepted at face value, is readily apparent. If the Commission, as alleged, changed its mind outside the record, the subsequent issuance of the compliance orders could not, *nunc pro tunc*, overcome the legal infirmity inherent in its previous failure to allow the motor-carrier protestants opportunity to be heard *before* deciding that the conclusions theretofore reached in its written reports were erroneous and should be reversed. Despite appellee's claim respecting the effect of the issuance of the compliance orders, one fact remains clear: The Commission, after public hearing, held that Frisco was to receive only so-called auxiliary and supplementary motor-carrier operating rights, which conclusion has not to this day been directly challenged by Frisco, and the Commission has never at any subsequent stage of these proceedings found that Frisco was entitled to any other type of motor-carrier operating authority.

Appellee's claim that the compliance orders constituted clear notice that the Commission intended to issue unrestricted certificates is not supported even by the language of the orders themselves. The very first paragraph of the order appended to the motion to affirm states, in part, "that the purchase of the operations herein involved having been approved and authorized, as provided in Section 213 of the Motor Carrier Act, 1935;". Bearing in mind that Section 213 (now included in §5) contains the very provisions which limit the Commission's power, when dealing with an application by a railroad or its affiliate to acquire a motor carrier, to authorization of so-called auxiliary and supplemental motor service, it is entirely logical that a recipient of the compliance order would assume that the quoted language indicated the Com-

mission's intention to ultimately issue a certificate in conformance with the restrictive language set forth in the cited section of the Act. This, we submit, is a far more plausible argument than that advanced by Frisco, particularly when it is kept in mind, as appellee admits, that independent motor carriers, prior to the issuance of the certificates, had challenged Frisco's right to conduct unrestricted motor operations.

It is interesting to contrast appellee's notions of fair play and proper procedure by the Commission, in its dealings with that agency, with its attitude insofar as the independent motor carriers vitally affected by those same dealings are concerned. We quote below a small portion of the argument by counsel for appellee, made before the District Court, when the Commission was attempting to introduce letters and memoranda from its dockets, admittedly relevant on the question of inadvertence, but which had not been introduced in the proceedings before the Commission:

> Now, on general principles memoranda from one section of the Commission to another section of the Commission is, if introduced in this manner completely hearsay and self-serving. If they propose that these, or if they state that these are necessary to the defense of this order, it seems to me that the order must be invalid on its face because if these things are necessary to sustain the finding of the order we have a situation where there was not evidence in the record before the Commission, and when I say record I mean record of the hearing before the Commission, on which the Commission could base its order. If they had to go outside of that hearing record and into their other files and take documents that were passed back and forth between sections of the Commission, clearly we were not given a fair trial because we were never confronted with these things. (Transcript of Argument below, June 19, 1956, page 44)

Thus it is seen that Frisco strenuously objected, at the argument below, to the introduction of material from the Commission's dockets on the ground that such material was "outside of that hearing record." But on the other hand, the same appellee can find no fault with the action which it alleges the Commission took wherein it is purported to have reversed its prior written decisions, confining the motor authority to be issued to Frisco to that auxiliary and supplemental to the train service of the parent railroad, and to have done so without even the pretense of a hearing and completely outside the record! Appellee insists, and properly so, on fair treatment by the Commission. Elemental fairness would seem to require equal consideration for the rights of the independent motor carriers.

Respectfully submitted,

GREGORY M. REBMAN
B. W. LATOURETTE
1230 Boatmen's Bank Bldg.
314 North Broadway
St. Louis 2, Mo.

WENTWORTH E. GRIFFIN
1012 Baltimore Street
Kansas City, Mo.

PETER T. BEARDSLEY
WILLIAM J. O'BRIEN, JR.
1424 Sixteenth Street, N.W.
Washington 6, D. C.
Attorneys for Appellants

CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 23rd day of January, 1958, I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to Wayne H. Bigler, Esq., Assistant United States Attorney, U. S. Court House, St. Louis, Mo., and by mailing copies in duly addressed envelopes, with postage prepaid, to The Solicitor General and Maurice A. Fitzgerald, Esq., Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes, with postage prepaid, to Robert Ginnane, Esq., its General Counsel, and to Charlie H. Johns, Jr., Associate General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On Frisco Transportation Company, by mailing copies of duly addressed envelopes, with airmail postage prepaid, to its attorneys Ernest D. Grinnell, James L. Homire, John E. McCullough, and Alvin J. Baumann, Esqs., at 300 Frisco Bldg., 906 Olive Street, St. Louis, Mo., and with postage prepaid, to Bernard G. Ostmann, Esq., Transportation Bldg., Washington 6, D. C.

4. On the Railway Labor Executives' Association, Brotherhood of Railroad Trainmen, and Order of Railway Conductors and Brakemen of America, intervening defendants, by mailing a copy in a duly addressed envelope, with postage prepaid, to James L. Highsaw, Jr., their attorney, at 620 Tower Bldg., Washington, D. C.

PETER T. BEARDSLEY